

Attachment C

Employee Relations Considerations

Having an understanding of employee relations issues that come into play in violent and potentially violent situations is important for all members of the Crisis Management Team (CMT), as well as all FEMA supervisors and managers. It helps in coordinating an effective response, in determining whether outside resources will be needed in certain situations, and in ensuring that appropriate disciplinary actions are taken.

It is important to involve the employee relations staff in such matters, because most reported incidents of violence result in some type of disciplinary or adverse action. Another reason is that, since the goal of workplace violence prevention efforts is to deal effectively and consistently with problem behavior early on, reporting incidents to the Security and Employee Relations staffs can result in swift disciplinary or adverse actions to stop the unacceptable behavior before it can escalate.

A. Administrative Actions to Keep Employee Away from the Work Site.

1. Immediate Short-term Action.

a. Place Employee on Excused Absence (commonly known as administrative leave). Placing the employee in a non-duty pay status is an immediate temporary solution to the problem of an employee who should be kept away from the work site. Some employees consider this a punitive measure. However, relevant case law indicates that as long as the employee continues receiving pay and benefits just as if he/she were in a duty status, excused absence does not constitute a disciplinary/adverse action, as set forth in Title 5, USC, Chapter 75.

When necessary, longer-term actions as discussed below should be taken, as appropriate. Depending on the circumstances, it may also be a good idea to offer the employee the option to work at home while on excused absence, if appropriate.

b. Detail Employee to Another Position. This can be an effective way of getting the employee away from the work site, where he or she is disturbing other employees. However, this action will be useful only if there is another position where the employee can work safely and without disrupting others.

2. Longer-Term Actions.

a. Indefinite Suspension. An indefinite suspension is an adverse action that takes an employee off-duty until the completion of an ongoing inquiry or investigation into allegations of misconduct. An indefinite suspension is usually appropriate when more than 30 days is needed to await the results of an investigation, await the completion of criminal proceedings, or make a determination on the employee's medical condition. Indefinite suspensions are covered under Title 5, Code of Federal Regulations (CFR), Part 752, Adverse Actions Procedures and require a 30-day advance notice period with pay. This means that after an indefinite suspension is proposed and a final decision is made to impose the suspension, the employee will no longer be in a pay status. The employee remains on indefinite suspension until completion of an investigation, completion of criminal proceedings, or determination is made on a medical condition.

b. Indefinite Enforced Leave. The procedure for placing an employee on enforced leave is the same as for an indefinite suspension. Title 5, CFR Part 752 procedures must be used before such action can be effected. It involves making the employee use his/her own leave (i.e., sick and/or annual leave) or placing the employee in a leave without pay (LWOP) status after the 30-day notice period with pay has expired). The employee remains on enforced leave pending the outcome of the investigation, criminal proceedings, or determination is made on the medical condition.

B. Disciplinary/Adverse Actions. If relevant information is available regarding violent, harassing, threatening, and other disruptive behavior, the supervisor must determine the appropriate disciplinary/adverse action that

should be taken. The selection of an appropriate charge and penalty should be discussed with the Employee and Labor Relations staff and Office of General Counsel. Some disciplinary/adverse actions include:

1. Reprimand, Warning, Short Suspension, and Alternative Discipline. These lesser penalties can be used in cases where the misconduct is not serious and progressive discipline may correct the problem behavior. They are an excellent means of dealing with problem behavior early on. The lesser actions involve considerably fewer procedures than the adverse actions listed below. Contact the Employee Relations staff prior to issuing a notice of this type to ensure procedural sufficiency and consideration of employee rights.

2. Removal, Reduction-in-Grade, and Suspension for More Than 14 Days. This type of action requires the issuance of a 30-day advance written notice. A 7-day notice period, instead of the usual 30-day period, is permitted when there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed. Due process must be afforded to the employee prior to effecting action of this type. Contact the Employee Relations staff prior to issuing a notice of this type to ensure satisfaction of procedural and regulatory requirements and compliance with employee rights.

C. Disability as a Defense for Alleged Misconduct. The Equal Employment Opportunity Commission (EEOC) has issued important guidance that addresses violent misconduct by employees with disabilities. It advises that an agency may discipline an employee with a disability who has violated a rule that is job-related and consistent with business necessity, even if the misconduct is the result of the disability, as long as the same discipline would be imposed on an employee without a disability. The Rehabilitation Act does not prevent employers from maintaining a workplace free of violence or threats of violence.

The guidance also states that an agency is not required to excuse misconduct as a reasonable accommodation. Reasonable accommodation is offered to help an employee maintain acceptable performance and standards of

conduct. Contact the Office of Equal Rights, Employee and Labor Relations Division, or Office of General Counsel for further guidance.

1. Ordering and Offering Medical Examinations. There are prohibitions in Federal personnel regulations regarding what medical information a supervisor can demand from the employee. Every supervisor should learn what can be **ordered** and what can be **offered**.

a. Ordering a Medical Examination. Under Title 5, CFR, Part 339, Medical Qualification Determinations, an agency may order a medical examination, including a psychiatric examination or psychological assessment, under rare circumstances. The only time an employee can be ordered to undergo such an examination is:

1) If the position occupied requires specific medical standards and the results of a current general medical examination, which the agency has authority to order, show no physical basis to explain the behavior which may affect the safe and efficient performance of the employee or others; or

2) If a psychiatric examination is specifically required by medical standards or a medical evaluation program.

b. Offering a Medical Examination. Under Title 5, CFR, Part 339, an agency may offer a medical examination, including a psychiatric evaluation where the agency needs additional medical information to make informed management decisions as to the employee's ability to perform safely and efficiently in the workplace. This may include situations where an employee requests for medical reasons a change in duty status, assignment, working conditions, or any other benefit or special treatment, including reasonable accommodations or employment on the basis of full or partial recovery from a medical condition. This may also include situations where the individual has a performance or conduct problem that may require agency action. The employee must be given written notice that outlines the reasons for offering the examination. Such examinations can be provided on a contractual basis through the U.S. Public Health Service, at the expense of the employing organization.

c. Refusal to Comply with Request for Medical Information.

Employees are requested to provide medical information on a voluntary basis. Therefore, refusal to provide the information cannot be used as the basis to take action against the employee. Should the employee refuse to provide the information requested, management decisions can only be based on the information available.

D. Disability Retirement. Employees with medical disabilities may be eligible for disability retirement if their medical condition warrants it and if they have the requisite years of Federal service to qualify. Regulations provided by the U.S. Office of Personnel Management specifically provide that an individual's application for disability retirement does not stop or delay the taking of an adverse action. The action, if any, should continue to be processed, while informing the employee of the option to file.

1. Assisting Employees. Employees should be counseled at any time there is reason to believe a medical condition is causing a service deficiency and the employee is eligible for disability retirement. Medical documentation may or may not be available to show that the employee is medically incapacitated. However, the option of disability retirement can be given to the employee to consider. An employee cannot be forced to file an application for disability retirement, despite a supervisor's belief that it is in the employee's best interest to file.

2. Agency-Filed Applications for Disability Retirement. Conditions under which an agency can file for disability on behalf of an employee are strictly limited. The U.S. Office of Personnel Management has set out five conditions that must be met before an agency can file on an employee's behalf:

- a. Agency has issued a decision to remove employee;
- b. Agency concludes, after review of medical documentation, that the cause of the unacceptable performance or misconduct is due to a medical condition;
- c. Employee is institutionalized, or based on the agency's review of medical information and other information, it concludes that the employee is incapable of making a sound decision to file on his/her own behalf;

d. Employee has no representative or guardian with the authority to file on his/her behalf; and

e. Employee has no immediate family member (spouse, parent or adult child) who is willing to file on the employee's behalf.

E. Grievance or Appeal of Disciplinary/Adverse Action. Once a disciplinary or adverse action is taken, the employee has the right to challenge the final decision. The avenues of redress available include the FEMA Administrative Grievance System, Alternative Dispute Resolution, Negotiated Grievance Procedures (where a bargaining unit exists), FEMA's Equal Employment Opportunity Complaint Process, or the U.S. Merit Systems Protection Board. Supervisors should always consult the Employee and Labor Relations Division and Office of General Counsel when considering and prior to imposing a disciplinary/adverse action.